



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
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ATLANTA, GEORGIA 30303-8960

Adam G. Sowatzka
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Sent via email: asowatzka@kslaw.com

Re: *United States of America et. al. v. City of Chattanooga*, No. 1:12-cv-00245
Response to COVID-19 Related Force Majeure Notification: Combined Sewer Overflow
Long Term Control Plan—Additional Operational Plan Implementation

Dear Mr. Sowatzka:

The U.S. Environmental Protection Agency, the U.S. Department of Justice (DOJ) and the Tennessee Department of Environmental Control (TDEC) are in receipt of your May 26, 2020, letter on behalf of the City Chattanooga (the City) pursuant to Section XI of the Consent Decree (the CD) in the above-referenced matter, providing notice of a COVID-19 related *force majeure* event that will cause a delay in performance of obligations under the CD. As you may be aware, on March 26, 2020, the EPA issued a temporary Policy: "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" (Policy) that addresses the EPA enforcement of environmental legal obligations during this time. As provided in Section I.C of the Policy, claims of an inability to comply with the terms of a judicial consent decree are properly handled pursuant to the consent decree's *force majeure* provisions. We are enclosing a copy of that Policy.

Your letter asserts a *force majeure* event based on the current COVID-19 pandemic, and indicates that the pandemic will result in a delay in completion of the City's LTCP-Additional Operational Plan Implementation, a project which will provide Peracetic Acid (PAA) disinfection for the City's Central Avenue and Williams Street CSO facilities. More specifically, your letter states that the project deadline of June 29, 2021, will not be met because the pandemic has prevented bench-scale testing activities which are critical for the design. Your letter indicates that the duration of the delay depends on the duration of the pandemic, but that the City anticipates that the project will be completed by June 29, 2022, which is an approximately 1-year delay. The EPA has consulted with the DOJ and TDEC in preparing this response.

We note that Paragraph 56 of the CD requires the City to "exercise best efforts to fulfill" the obligations of the CD, including the use of best efforts to anticipate any potential *force majeure* event. Further, these efforts should "address the effects of any such event: (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible." In addition, paragraph 57 of the CD requires that a *force majeure* notification include the following information: (1) an explanation and description of the reasons for the delay; (2) the anticipated duration of the delay; (3) all actions taken or to be taken to prevent or minimize the delay; (4) a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; (5) Chattanooga's rationale for

attributing such delay to a force majeure event; and (6) a statement as to whether, in the opinion of Chattanooga, such event may cause or contribute to an endangerment to public health, welfare.

Your letter includes each of these items of information but acknowledges that the duration of the delay is dependent on the duration of the pandemic. Thus, while you state that the City anticipates that the project impacted by the force majeure event will be completed by June 29, 2022, for an approximate 1-year delay, this remains speculative based on uncertainty regarding the duration of impacts from the pandemic.

The information in your letter sufficiently documents that a *force majeure* event has occurred. However, further information is needed to determine the amount of delay that the force majeure event will cause and confirm that the one-year extension suggested by the City is justified. Because of the uncertainty surrounding the developing consequences of the COVID-19 public health emergency, we understand that the City may not have complete information at this time, but it should provide additional information in accordance with the CD as more information becomes available. The one-year delay that the City anticipates may turn out to be warranted, but is still speculative at this point, especially in light of the City's obligation to use best efforts to minimize any resulting delay to the greatest extent possible. We request that you provide further information to us as it develops regarding the duration of the delay and the project completion date. The City's update should include an explanation of how the force majeure event will result in the specific delay that you determine is warranted.

In addition to compliance with the express provisions of the CD, the City is encouraged to maintain an open and continuing dialogue with the EPA, DOJ, and TDEC. This will serve to protect human health and the environment, minimize potential misunderstandings, and facilitate timely and appropriate decision-making as this situation unfolds.

Should you have any questions regarding the above or any aspect of this matter, please do not hesitate to contact Associate Regional Counsel Paul Schwartz at (404) 562-9576 or via email at schwartz.paul@epa.gov.

Sincerely,

Carol L. Kemker
Director
Enforcement and Compliance Assurance Division

cc: Sohnia Hong, Tennessee Attorney General's Office
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